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CLERK US DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

CHARLES T. CLEMANS, JR.,

CASE NO. 07cv1162 WQH (PCL)

Petitioner,

ORDER

vs.

J. A. YATES, Warden, et al.,

Respondent.

HAYES, Judge:

The matters before the Court are (1) the motion for a certificate of appealability filed by Petitioner (Doc. # 41); (2) the motion requesting permission for consideration of Petitioner's equal protection claim pursuant to Federal Rule of Civil Procedure 60(b) filed by Petitioner (Doc. # 45); and (3) the motion for reconsideration pursuant to Federal Rule of Civil Procedure 60(b) filed by Petitioner (Doc. # 47).

Procedural Background

On June 27, 2007, Petitioner Charles Clemans, a state prisoner represented by counsel, filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254. (Docs. # 1, 2.) The Petition contained three grounds on which Petitioner claimed habeas relief: (1) "Petitioner has a state-created liberty interest protected by the U.S. Constitution's Fifth and Fourteenth Amendments in retaining his already earned conduct credits;" (2) "Petitioner is also entitled to his earned credits under government estoppel or equitable estoppel principles;" and (3) "Petitioner has a state-created liberty interest protected by the U.S. Constitution's Fourteenth

1 Amendment in being released on parole as ‘part of’ his sentence.” (Doc. 1, at 6-8.)

2 On September 30, 2007, Respondents filed a motion to dismiss the Petition, on grounds
 3 that each of Petitioner’s claims for relief were time-barred, that claim two failed to state a
 4 federal claim, and that claim three was not ripe for review. (Doc. # 6.) On April 4, 2008 the
 5 Magistrate Judge filed a Report and Recommendation granting in part and denying in part
 6 Respondent’s motion to dismiss. (Doc. # 24.) The Magistrate Judge concluded that Plaintiff
 7 had failed to exhaust his administrative remedies with respect to Petitioner’s first claim for
 8 relief. (*Id.* at 6.) The Magistrate Judge recommended that this Court dismiss claim one of the
 9 Petition without prejudice, to allow Petitioner to properly exhaust his administrative remedies
 10 before seeking federal habeas review. (*Id.*) The Magistrate Judge recommended that this
 11 Court dismiss claim two with prejudice for failure to state a federal claim. The Magistrate
 12 Judge concluded that Petitioner’s federal habeas petition was filed after the expiration of the
 13 one year limitations period in the Anti-Terrorism and Effective Death Penalty Act (AEDPA).
 14 The Magistrate Judge recommended that this Court dismiss Petitioner’s third claim for relief
 15 with prejudice based on Petitioner’s failure to comply with the one year statute of limitations.
 16 (*Id.*)

17 On April 21, 2008, Petitioner filed objections to the Report and Recommendation.
 18 (Doc. # 28.) Petitioner asserted that he had exhausted his administrative remedies and that
 19 each of his claims for habeas relief alleged a federal question. In support of his assertion that
 20 he had exhausted his administrative remedies, Petitioner submitted an opinion of the California
 21 Court of Appeal denying Petitioner’s first claim for habeas relief on the merits. (Doc. # 36.)

22 This Court reviewed Petitioner’s objections and the Report and Recommendation.
 23 (Doc. # 38.) In light of the supplemental materials submitted by Petitioner with his objections,
 24 this Court rejected the portion of the R&R which concluded that Petitioner had failed to
 25 exhaust his administrative remedies. Upon a de novo review of Petitioner’s first claim, this
 26 Court concluded that federal habeas relief was not available pursuant to 28 U.S.C. § 2254(d)
 27 because the judgment of the California Court of Appeal was neither contrary to, nor an
 28 unreasonable application of, clearly established federal law. This Court denied Petitioner’s

1 first claim for relief with prejudice.

2 This Court adopted the recommendation of the Magistrate Judge and dismissed claim
 3 two of the petition for failure to state a federal claim. With respect to claim three of the
 4 petition, this Court found that “the Magistrate Judge correctly concluded that Petitioner is not
 5 entitled to relief on his claim for adjustment of his parole status as Petitioner failed to bring
 6 the claim within the AEDPA’s one-year limitations period.” (*Id.*) This Court further adopted
 7 the recommendation of the Magistrate Judge and dismissed claim three of the petition with
 8 prejudice. This Court granted Respondent’s motion to dismiss the Petition with prejudice and
 9 denied each of Petitioner’s claims for habeas relief. On August 1, 2008, the Clerk of Court
 10 entered judgment and closed the case. (Doc. # 39.)

11 On August 13, 2008, Petitioner filed a “notice of appeal and notice that no certificate
 12 of appealability is required.” (Doc. # 40.) Petitioner asserts that “because this petition
 13 involves decisions of prison officials to not give Petitioner his already earned credits and not
 14 calculate his release date as ‘part of his sentence,’ both these administrative decisions do not
 15 require a Certificate of Appealability; therefore, no COA is required.” (Doc. # 40 at 2.) The
 16 Clerk of the Court construed this document as a motion for a certificate of appealability. (Doc.
 17 # 41.)

18 On September 8, 2008, Petitioner filed a motion for reconsideration of his third ground
 19 for relief pursuant to Federal Rule of Civil Procedure 60(b). (Doc. # 47.) On September 22,
 20 2008, Petitioner filed a motion requesting permission for consideration of his equal protection
 21 claim pursuant to Federal Rule of Civil Procedure 60(b). (Doc. # 45.)

22 On December 23, 2008, the Office of the Clerk for the United States Court of Appeals
 23 for the Ninth Circuit filed a Notice of USCA Case Number 08-57051. (Doc. # 48.) On the
 24 same date, the Court of Appeals filed a Time Schedule Order setting the briefing schedule.
 25 (Doc. # 49). Petitioner’s opening brief is to be filed and served by February 2, 2009;
 26 Respondent’s appellant brief is to be filed and served by March 4, 2009, and Petitioner’s
 27 optional reply brief is due ten days after being served with Respondent’s appellate brief. (Doc.
 28 # 49.) Pursuant to Fed. R. App. P. 34(a), the Ninth Circuit will take the matter under

1 submission on the briefs and record without oral argument. (Doc. # 49.)

2 **Discussion**

3 *1) Motion for Certificate of Appealability*

4 A habeas petitioner must secure a certificate of appealability where “the detention
 5 complained of arises out of process issued by a State court.” 28 U.S.C. § 2253(c)(1)(A). The
 6 Ninth Circuit construes this language “to hold that a certificate of appealability ‘is not required
 7 when a state prisoner challenges an administrative decision regarding the execution of his
 8 sentence.’” *Rosas v. Nielsen*, 428 F.3d 1229, 1231 (9th Cir. 2005) (quoting *White v. Lambert*,
 9 370 F.3d 1002, 1010 (9th Cir. 2004). “Thus, the district court looks at who made the detention
 10 decision complained of by the state prisoner, an administrative body or a judicial one, in
 11 determining whether a certificate of appealability is required.” *Rosas*, 428 F.3d at 1229.

12 In this case, Petitioner challenges the administrative decisions made by the California
 13 Department of Corrections and Rehabilitation regarding the execution of Petitioner’s sentence.
 14 Petitioner’s claims for habeas relief do not “arise out of a process issued by a State court.” 28
 15 U.S.C. § 2253(c)(1)(A). Accordingly, no certificate of appealability is required.

16 *2) Rule 60(b) Motions*

17 Petitioner, proceeding pro se, filed a Rule 60(b) motion to reconsider whether
 18 Petitioner’s third claim for relief is time-barred by the AEDPA statute of limitations. (Doc.
 19 # 47.) Petitioner contends that “the evidence Petitioner was unable to get from his negligent
 20 counsel, who adamantly refuses to give Petitioner his documents to this day, shows that the
 21 District Court’s dismissal was based on the assumption that Petitioner never filed in the Court
 22 of Appeal [for the State of California] when he did.” (Doc. # 47 at 9). Petitioner asserts that
 23 his failure to “get proof of his filings to the Court” was the result of excusable neglect. (*Id.*)

24 Petitioner also requests this Court to consider an equal protection claim not previously
 25 asserted in his federal habeas petition pursuant to Rule 60(b) of the Federal Rules of Civil
 26 Procedure. (Doc. # 45.) Petitioner asserts that his attorney refused to present the equal
 27 protection claim in the initial petition and refused to amend the petition to add the claim.
 28 Petitioner contends that the conduct of his attorney constitutes an extraordinary circumstance

1 sufficient to justify Rule 60(b)(6) relief.

2 “Rule 60(b) allows a party to seek relief from a final judgment, and request reopening
 3 of his case, under a limited set of circumstances.” *Gonzalez v. Crosby*, 545 U.S. 524, 528
 4 (2005) (citing Fed. R. Civ. P. 60(b)). “To seek Rule 60(b) relief during the pendency of an
 5 appeal, the proper procedure is to ask the district court whether it wishes to entertain the
 6 motion, or to grant it, and then move [the appellate] court, if appropriate, for remand of the
 7 case.” *Williams v. Woodford*, 306 F.3d 665, 683-684 (9th Cir. 2002) (quotations and citations
 8 omitted). Without remand from the appellate court, “the filing of a notice of appeal divests
 9 the district court of jurisdiction to dispose of the motion after an appeal has been taken.” *Long*
 10 *v. Bureau of Economic Analysis*, 646 F.2d 1310 (9th Cir. 1981).

11 In this case, Petitioner filed a notice of appeal on August 13, 2008. (Doc. # 40.)
 12 Petitioner filed his motion to reconsider (Doc. # 45) and his motion requesting consideration
 13 of his equal protection claim (Doc. # 47) in September 2008. On December 23, 2008, the
 14 United States Court of Appeals for the Ninth Circuit docketed Petitioner’s appeal (Doc. # 48)
 15 and set a briefing schedule for the parties (Doc. # 49). Petitioner has not asked this Court to
 16 entertain either of his Rule 60(b) motions, and it is not clear that Petitioner wants to remand
 17 his case to this Court prior to the Ninth’s Circuit’s disposition on appeal. The Court concludes
 18 that it lacks jurisdiction to dispose of Petitioner’s motions while his case is on appeal.

19 Conclusion

20 IT IS HEREBY ORDERED that Petitioner’s motion for a certificate of appealability
 21 (Doc. # 41) is DENIED. Petitioner’s motion to reconsider (Doc. # 47) is DENIED.
 22 Petitioner’s motion requesting consideration of his equal protection claim (Doc. # 45) is
 23 DENIED. If Petitioner does wish to have his case remanded from the Ninth Circuit, he may
 24 file a motion requesting this Court to entertain his Rule 60(b) motions within 15 days of the
 25 date of this order.

26 DATED: 1/21/09


 27 WILLIAM Q. HAYES
 28 United States District Judge